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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1237

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 86-91, 157-160) are unreported. The opinions of the Circuit Court of Appeals (R. 168-173) are not as yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 19, 1947 (R. 174). The petition for a writ of certiorari was filed on April 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Secretary of War was authorized by Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. Supp. V, sec. 171a, to acquire an easement in lands for a period terminating fifteen years after termination of the national war emergency.

2. Whether both courts below erred in concluding that the Secretary's determination to take such an interest was not arbitrary or capricious and, hence, was not subject to judicial review.

STATUTES INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C., Supp. V, 171a, reads as follows:

* * * * *

The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such prop-

erty or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.

STATEMENT

On October 30, 1942, the Secretary of War requested the institution of proceedings under the Second War Powers Act¹ to condemn a right-of-way for the construction of a railroad connection between Sanford Lake, New York, and the terminus of the Delaware and Hudson Railroad Corporation at North Creek, New York, the Secretary stating that the acquisition was necessary "for the transportation of strategic materials vital to the successful prosecution of the war" (R. 136-137). The Secretary determined that the interest necessary to be taken in so much of the

¹ Act of August 18, 1890, c. 797, 26 Stat. 316, as amended by the Acts of July 2, 1917, c. 35, 40 Stat. 241, April 11, 1918, c. 51, 40 Stat. 518, 50 U. S. C. 171, and March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C., Supp. V, 171a.

lands as belonged to New York State was a temporary easement "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order." As to lands privately owned, however, a perpetual easement without time limitation was sought (R. 34, 35). The Government on November 9, 1942, filed its petition to acquire such interest in the lands of petitioner, duly setting forth the determination of the Secretary of War and the purposes for which the interest was being taken (R. 33-38). On the same day, an order of immediate possession was entered (R. 42-44).

Petitioner, by amended answer filed March 18, 1943 (R. 45-52), alleged that the railroad was to be constructed by the Defense Plant Corporation, an instrumentality of the United States, and that under the terms of an agreement between that corporation, the National Lead Company, and the Delaware and Hudson Railroad Corporation, the National Lead Company was to construct the line for the Defense Plant Corporation, title to the railroad to be in the corporation, and the property to be leased by the corporation to the National Lead Company for a period ending in any event thirty days after the termination of the national emergency as determined by either the President or the Congress of the United States. It was further alleged, upon information and belief, that the purpose of the United States in taking for the

period following the emergency was to amortize and liquidate its investment. Petitioner further alleged that the taking was expressly for war purposes, that the powers conferred by the Second War Powers Act were temporary in character, and that the taking for any period beyond the duration of the emergency was a taking for a private purpose, was violative of a section of the New York Constitution forbidding lease, sale, exchange, or other disposition of the forest lands of the State, and was unreasonable and arbitrary. Petitioner's answer did not question that the taking of an easement for the duration of the emergency was for a public purpose and valid, and the sole prayer of the answer was to have the easement limited to the duration of such emergency.

On March 18, 1943, the Government filed its motion for summary judgment condemning the property as prayed in its petition (R. 22-23). An affidavit in support of said motion set forth the exact determination by the Secretary of War of the interest necessary to be taken, averred that under the Second War Powers Act it was for him to determine such matters, that the State's answer did not charge the Secretary with bad faith in making such determination, that his determination is not subject to judicial control, and that the amended answer presented no real or substantial defense to the action (R. 23-28).

Hearing was had on the Government's motion, at which time petitioner was permitted to introduce in evidence a copy of a letter dated October 29, 1942, in which Mr. John W. Snyder, then Executive Vice-President of the Defense Plant Corporation, advised Senator Wagner that the reason for taking an easement extending fifteen years after the emergency was "to prevent the Government from being forced to sacrifice its investment without an opportunity of working out a proper liquidation" (R. 135). On January 28, 1944, the district court (Honorable Frederick H. Bryant presiding) rendered its opinion sustaining the Government's motion for summary judgment (R. 86-91) and on February 25, 1944, that court entered a decree sustaining the right to condemn (R. 29-31). Petitioner thereafter took an appeal from this decree which was dismissed by the Circuit Court of Appeals since the order was not final and appealable (R. 2).

On March 26, 1946, petitioner filed a motion to reopen the action on the ground of newly discovered evidence. As exhibits to this motion petitioner filed copies of portions of an "Advance Listing" of Government-owned Industrial Plants issued in August, 1945, by the Reconstruction Finance Corporation (R. 140-156). This listing included the railroad property for which the easement here in question was acquired. Also filed as an exhibit was a letter from Mr.

Harold E. Jacobson, counsel for the Loan Agency of the Reconstruction Finance Corporation, dated March 13, 1946, advising counsel for petitioner that as of two days before the letter was written the property in question had not been declared surplus property and was not for sale (R. 156-157).² On May 29, 1946, the court (Honorable Stephen W. Brennan presiding) rendered its opinion denying the motion to reopen, and an order in accordance therewith was entered on June 10, 1946 (R. 158-162).

Upon the issue of value, which remained to be determined, the parties stipulated that just compensation was the sum of \$11,700.00 (R. 162-165). Final judgment of condemnation fixing compensation in this amount was entered on June 29, 1946 (R. 6-9), from which petitioner appealed.

The Circuit Court of Appeals, one judge dissenting, affirmed. That court held (R. 170-172) that there was clear statutory authority for the taking. The court held that judicial review of the Secretary's determination of necessity was limited, at most, to an inquiry as to whether that official's action was arbitrary, capricious or in bad faith. With regard to the taking of an in-

² The listing plainly stated that "*With a few exceptions* they [the listed properties] are or will be available for peacetime industrial or other uses." (R. 148, italics supplied.) Such listing is thus not an offer to sell the railroad, nor does it establish that the particular property has been declared surplus.

terest extending beyond the duration of the war, the court noted (R. 171) petitioner's concession that the taking for the duration of the national emergency was proper, held that it could not pronounce the Secretary's action arbitrary or capricious, and that the economic aspects of the project were proper factors for the Secretary to consider in making his determination. In a dissenting opinion (R. 172-173) Judge Learned Hand agreed with the judgment of the trial court in 1944 sustaining the taking. However, he believed that the question was different after the cessation of hostilities and was of the view that the cause should be remanded apparently for the purpose of weighing the relative economic interests of the Government and petitioner.

ARGUMENT

1. There can be no question of constitutional authority of the United States, to take the easement here condemned for the public purpose of prosecuting the war. It is equally clear that in execution of that purpose consideration may be given to the recoupment of the investment made by the Government in improvements. *Old Dominion Co. v. United States*, 269 U. S. 55; *United States v. Forbes*, 259 Fed. 585 (M. D. Ala.) affirmed, 268 Fed. 273 (C. C. A. 5). In *United States ex rel. T. V. A. v. Welch*, 327 U. S. 546, this Court sustained a taking of lands not

actually within the flood area of a dam and reservoir project. The fact was that economic savings motivated the taking of such lands, and this Court stated that "T. V. A. was not supposed to waste the money of the United States" (327 U. S. at p. 549) and that "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost" (327 U. S. at p. 554). The constitutional power of the federal government is not limited by the fact that the land needed for public purposes is owned by a State or a subdivision thereof rather than private persons. *Oklahoma v. Atkinson Co.*, 313 U. S. 508, 534; *United States v. Carmack*, 329 U. S. 230. It is thus apparent that the United States could constitutionally condemn fee title or any lesser interest in the lands of petitioner.

2. The discretion to exercise such authority was delegated to the Secretary of War and other officers. Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 117, 50 U. S. C., Supp. V, 171a (p. 2, *supra*) authorizes the Secretary of War and other Government officers to "acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes." Petitioner's argument that a taking for a period beyond the

actual existence of hostilities is not authorized is based upon the fact that the Second War Powers Act was limited in its life (Pet. 5, 14). But that restriction did not limit the duration of the property interest which might be taken. As the court below observed (R. 170), petitioner conceded that the statute authorized the taking of a fee. In effect petitioner repeats that concession here (Pet. 16). Such takings of interests extending beyond the war period have been uniformly upheld. *United States v. 243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert v. United States*, 317 U. S. 698; *United States v. Marin*, 136 F. 2d 388 (C. C. A. 9); *United States v. Kansas City, Kansas*, 159 F. 2d 125 (C. C. A. 10).

3. The only question remaining is whether the Secretary of War properly exercised the authority delegated to him. Here the Secretary of War, in unequivocal terms (R. 136-137), determined that it was "necessary and advantageous" to acquire a temporary easement over petitioner's lands "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order," and he stated the public purpose as being "for the transportation of strategic materials vital to the successful prosecution of the war." The argument (Pet. 12-15) that the Secretary sought to exceed the authority dele-

gated to him because he used the above-quoted language rather than the precise phrasing of the Second War Powers Act plainly lacks merit. Cf. *Old Dominion Co. v. United States*, 269 U. S. 55, 66-67. As the Circuit Court of Appeals noted (R. 169), petitioner has conceded that, so far as the duration of the emergency is concerned, the taking was for a public purpose and the determination of the Secretary is unassailable. By its answer (R. 51-52) petitioner complained only of the taking beyond the period of the emergency.

Petitioner's argument is basically that the taking for the fifteen year period beyond the duration was for the purpose of liquidating the Government's investment. Assuming this, however, it does not establish that the Secretary's action is arbitrary.³ Since the taking initially was for a public purpose, the Secretary can properly take into account the economic factor in determining the extent of the taking. This economic factor essentially underlies the purpose of Congress in authorizing a fee taking even though the property is taken solely for purposes connected with

³ That the Secretary actually took into account the interests of the State in preserving these lands is shown by the fact that, although authorized to take a fee simple interest and although the Government condemned a *perpetual* easement over the 8.15 acres of land in private ownership necessary for construction of the road (R. 34, 35), he limited the taking of the State's land to a period terminating fifteen years after the emergency.

the prosecution of the war. Tremendous losses would have resulted during the last war if only an interest for the duration of the war could have been taken in any case. The instant case is no exception, since the construction of thirty miles of railroad involves a heavy investment. As the court below stated (R. 172), "The scrapping of a railroad line after only a few years of operation means almost a total loss of investment."

As we have shown (*supra*, pp. 8-9), such economic factors are relevant considerations in all public projects. Petitioner's contentions have no tendency to show that the Secretary of War was acting arbitrarily, capriciously or in bad faith. Rather, they represent simply a disagreement with the Secretary's conclusion as to the necessity of taking the easement he selected rather than one of shorter duration. But it is not a judicial function to compare the savings to the United States with the injury to local interests and revise the determination of the Secretary of War to reflect the court's view as to the best compromise between those interests. Thus in the instant case, as in *United States v. Carmack*, 329 U. S. 230, 243, "it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned." What-

ever may be the rule as to action in bad faith or as to arbitrary or capricious action it is generally accepted that the trial court may not simply substitute its judgment for that of the administrative officer to whom the discretion to choose the interest to be taken has been delegated. The conclusion of both courts below (R. 90-91, 160, 171) that the exercise of discretion here was not arbitrary or capricious is plainly correct.

Judge Hand, while dissenting, agreed that the trial court's decision in 1944, wherein Judge Bryant concluded that the Secretary of War had not abused his discretion (R. 90-91), was correct (R. 172). Certainly the fact that the final judgment was entered four years after the Secretary's original determination at a time when hostilities had ceased does not tend to indicate that the Secretary had acted arbitrarily or capriciously. As the trial court held (R. 159-160) the events occurring subsequent to the making of the Secretary's determination, upon which petitioner relies (Pet. 10), are irrelevant. Finally, the suggestion that these were two independent takings (Pet. 9) is contrary to fact. There was a single taking of an easement, reference being made to the existing emergency simply for the purpose of computing the time during which the easement should exist (R. 25-26).

CONCLUSION

The decision below is correct and no conflict of decisions is present. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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MAY 1947.

